

**UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA**

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VIZIONWORKS, LLC, a limited liability corporation,

Plaintiff,

V.

**DOYCE W. ELLENBURG, an individual;
SHIRLEY F. ELLENBURG, an individual;
SUMMIT REALTY SOUTHEAST, LLC,
a corporation,**

Defendants.

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DEBRA P. HACKETT, CLK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

CASE NO.

2:07CV96-MEF

COMPLAINT

Parties - Jurisdiction and Venue

1. Plaintiff **VIZIONWORKS, LLC** is a limited liability corporation which is organized and existing pursuant to the laws of the State of Georgia, having its principal place of business in Tifton, Georgia. The individual Defendants, **DOYCE W. ELLENBURG** and **SHIRLEY F. ELLENBERG**, are residents of Baldwin County, Alabama who are over the age of nineteen (19) years. Defendant **SUMMIT REALTY SOUTHEAST, LLC** is a corporation organized and existing under the laws of the State of Alabama having its principal place of business in Auburn, Alabama.

2. Jurisdiction exists by virtue of the complete diversity of citizenship which exists between the parties, and by virtue of the amount in controversy, which exceeds the sum of \$75,000.00, exclusive of interest and costs.

3. Venue is appropriate in this Judicial District, in which the funds made the subject of this action are held in escrow and where defendant Summit Realty Southeast is located.

Facts

4. Vizionworks, LLC, is a real estate development company which is involved in the purchase and development of land for residential subdivisions and other uses, primarily in the southeast United States. During 2006, Plaintiff learned that the Ellenburg Defendants were interested in selling land known as the Rattlesnake Ridge Horse Farm in Gulf Shores, Alabama. Plaintiff contacted the Ellenburgs, who at all times were represented by legal counsel, and entered into negotiations for the purchase of said property.

5. On May 25, 2006, Plaintiff and the Ellenburg Defendants entered into a Commercial Real Estate Purchase and Sale Agreement (hereinafter Agreement) for the purchase of the aforesaid real property. In paragraph 14 of the Agreement, the Ellenburgs agreed that Vizionworks, LLC would have 150 days to perform a due diligence evaluation of the Ellenburgs' property, and that the Agreement would be null and void if certain conditions specified in the Agreement were not met to Plaintiff's satisfaction.

6. Pursuant to the Purchase Agreement, Vizionworks deposited earnest money in the amount of \$200,000.00 with Summit Realty Southeast, which agreed to hold said funds pursuant to the terms of the Agreement.

7. Within the due diligence period provided in the Agreement, Plaintiff investigated the proposed site for development and contemporaneously sought to obtain a loan commitment on terms and conditions acceptable to the Plaintiff. Specifically, Plaintiff commissioned a land planning report from THK Associates, a market research, land planning, and landscape architecture firm located in Aurora, Colorado. The THK report advised Plaintiff of certain physical and environmental problems which would have to be addressed and resolved before the proposed site could be economically developed. Plaintiff's efforts to resolve the access issues were not successful. Additionally, Plaintiff sought financing proposals from area lenders, who advised that due to Gulf Coast market conditions, financing in excess of 65% of the proposed contract price was unavailable. The terms of the proposed financing were not acceptable to Vizionworks.

8. By letter dated September 12, 2006, Plaintiff advised Defendants that it was exercising its right to cancel the contract. Plaintiff requested return of the earnest money deposit. The Ellenburg Defendants have refused to authorize the escrow agent to return the earnest money deposit.

9. By virtue of the foregoing facts and circumstances, there currently exists a controversy, justiciable by this Court in exercise of its legal and equitable powers, as to the competing claims of the Plaintiff and the Ellenburg Defendants to the escrowed funds. All efforts to resolve this controversy without litigation have failed.

COUNT I

Breach of Contract

10. Plaintiff adopts and incorporates averments of paragraphs 1 through 9 as if fully set forth herein.

11. The Ellenburg Defendants have breached the terms of the Sale and Purchase Agreement by failing to acknowledge Plaintiff's right to cancel and rescind the Agreement based upon the results of the due diligence examination, and by refusing to authorize the return of the earnest money deposit to Plaintiff. As a result of the Ellenburg Defendants' breach, the Plaintiff has been deprived the use of its funds and wrongfully denied refund of its property.

WHEREFORE, PREMISES CONSIDERED, Plaintiff demands judgment against the Ellenburg Defendants in the amount of Two Hundred Thousand and no/100 Dollars (\$200,000.00), plus all interest permitted by law and all costs of this action, together with such further and different relief as to which the Plaintiff is entitled pursuant to the Sale and Purchase Agreement.

COUNT II

Specific Performance

12. Plaintiff adopts and incorporates averments of paragraphs 1 through 11 as if fully set forth herein.

13. The Ellenburg Defendants, without justification or excuse, have refused to perform the obligations set forth in the Agreement regarding return of the earnest money deposit. Unless directed to specifically perform their obligations, the Plaintiff will be

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irreparably injured. In equity and good conscience, the Ellenburg Defendants should be required to immediately and specifically perform their obligation to authorize the return of the earnest money deposit in accordance with the terms and conditions of the Agreement.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests this Court, in the exercise of its equitable powers, direct the Ellenburg Defendants to specifically perform their obligations and to do all things necessary to provide for the immediate release and delivery of the earnest money deposit to Plaintiff.

COUNT III

Request for Declaratory Judgment

14. Plaintiff adopts and incorporates averments of paragraphs 1 through 13 as if fully set forth herein.

15. The Ellenburg Defendants have refused to acknowledge Plaintiff's right for immediate refund of the earnest money deposit. Accordingly, there presently exists a justiciable controversy as to the rights of the Plaintiff in the escrowed funds and the Plaintiff's right to seek possession of said funds. Plaintiff offers to do equity, and requests that the Court, upon a full hearing of all the evidence, issue a declaratory judgment as to the competing interests of Plaintiff and Ellenburg Defendants in said funds, and upon such hearing and determination, order, adjudge, and decree that Defendant Summit Realty Southeast immediately pay to Plaintiff all funds in its possession, together with all interest accumulated thereon.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests this Court issue a declaratory judgment that the Plaintiff is the rightful owner of the earnest money deposit and is entitled to an immediate refund of said funds, and thereafter, order, adjudge and decree that Defendant Summit Realty Southeast immediately pay to the Plaintiff all funds in its possession, together with all interest accumulated thereon.

Respectfully Submitted,



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OF COUNSEL:

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